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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND D. THORNTON, Defendant and Appellant.	A154872 (San Francisco City and County Super. Ct. No. SCN228666)

Appellant Raymond Thornton was charged with multiple offenses arising out of an assault and subsequent encounter with and attempt to evade the police. Convicted of felony possession of a concealed dirk or dagger and two counts of misdemeanor assault and granted probation, he contends the assault convictions must be reversed because defense counsel conceded guilt without appellant having waived his constitutional rights. Alternatively, he maintains the two assault convictions should be consolidated into a single conviction because both convictions were for identical single offense. Finally, appellant argues the case should be remanded to the trial court for a determination whether to grant pretrial diversion pursuant to Penal Code section 1001.36, [1] which became effective the day before he was sentenced.

Respondent seeks dismissal of the appeal due to appellant's failure to appear as ordered for a required hearing several months after he was sentenced and filed notice of this appeal. We agree that appellant's apparent fugitive status warrants dismissal of the

[1] Further statutory references will be to the Penal Code unless otherwise indicated.

appeal, which we will order to take effect unless appellant surrenders to the appropriate authorities within 30 days of the date this opinion is filed.

BACKGROUND

Jasper Seldin was sitting outside a bakery eating pizza when appellant suddenly struck him on the nose with a retractable metal walking stick resembling a ski pole, then walked away and, from a distance of about 100 feet, looked back at Seldin with an "extremely angry look on his face." Seldin felt dizzy; his nose became swollen and remained so for a few days, there was visible bruising and the injury was painful. Peter Silva, one of the friends with whom Seldin was sitting, testified that appellant struck Seldin with his cane hard enough that it made an audible "thud" and Seldin's head "was jerked back." Silva called 911 and they followed appellant for about two blocks, about three quarters of a block behind him, until the police made contact with them and they pointed out appellant.

As the responding police officers confronted appellant, he dropped his belongings (a tent, a backpack and what appeared to be a ski pole) on the ground, yelled, "I have a gun," and pulled from his waistband a knife with a five-inch blade. With the knife in his hand, he lunged toward the officers in a "threatening manner," then "took off running" despite repeated commands to drop the knife and get on the ground from an officer holding him at gunpoint. The officers pursued appellant, as did others who responded to their call for back up. Appellant ran northward in the southbound lane of the street, still holding the knife, jumped onto and "stomp[ed] down" on the hood of a parked car, then jumped from it onto the hood of a sport utility vehicle (SUV) that had pulled to the side of the street. He jumped up and came "crashing down," "collaps[ing]" a portion of the hood. He then walked up the windshield onto the roof of the SUV and jumped, bringing his knees up to his chest and coming down in a "stomping motion," going through the glass roof of the vehicle, falling about chest deep into the back seat and then climbing out. A baby was in a carseat in the back seat but was not injured. Appellant started to run down a side street but almost immediately lay down in a driveway, where he was handcuffed and the knife and a sheath recovered. A number of police officers had arrived

at the scene and had guns pointed at appellant. Appellant's hands and bare feet were bleeding.

Appellant was transported to the hospital, where he was treated for lacerations to both hands and small lacerations or abrasions to his feet. The emergency room physician who treated him testified that appellant was in an "altered mental state" when he arrived. The paramedics had administered a sedative commonly used for agitated or combative patients. The physician observed appellant over the course of about four hours and opined that he likely suffered from schizophrenia. Appellant's reported behavior—running from police with hands cut on his own knife and jumping through a "sun roof"—"fit [a] possible picture" of schizophrenia.

Appellant was charged with eight felony offenses: assault with a deadly weapon (§ 245, subd. (a)(1)) (count 1); assault with force likely to cause great bodily injury (§ 245, subd. (a)(4)) (count 2); exhibiting a deadly weapon to a police officer to resist arrest (§ 417.8) (counts 3 and 4); threatening an officer (§ 69, subd. (a)) (count 5), with alleged personal use of a deadly weapon (§ 12022, subd. (b)(1); carrying a concealed dirk or dagger (§ 21310) (count 6); child endangerment (§ 273a, subd. (a)) (count 7); and vandalism (§ 594, subd. (b)(1)) (count 8).[2] Before trial, the court granted a defense motion to dismiss count 7 pursuant to section 995.[3]

The jury found appellant guilty of assault (§ 240) as a lesser included offense in both counts 1 and 2, and guilty of the weapon charge in count 6. It found him not guilty of the charges in counts 3, 4, and 5, as well as the charged offenses in counts 1 and 2. The jury deadlocked on the vandalism charge, and the trial court declared a mistrial as to this count, then subsequently granted the prosecutor's motion to dismiss the charge. A trailing misdemeanor case was dismissed with a *Harvey* waiver.

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[2] The information alleged that each of the charged offenses was committed while appellant was on bail (§ 12022.1, subd. (b)), but these allegations were dismissed prior to trial on the prosecutor's motion.

[3] The court denied the section 995 motion as to counts 1 and 2.

At sentencing, the court denied appellant's motion to reduce the count 6 felony conviction to a misdemeanor. The court suspended imposition of sentence on count 6 and placed appellant on three years' formal probation, with specified conditions including that he serve 152 days in county jail with credit for having served all of that time, and that he engage in substance abuse and mental health counseling as directed by the probation department and fully comply with all treatment directives and medications ordered by any mental health professional. On count 1, misdemeanor assault, the court sentenced appellant to 180 days in county jail concurrent to the sentence on count 6, with credit for having served all of that time. The court imposed the same sentence on count 2 as on count 1, but stayed this sentence pursuant to section 654.

DISCUSSION

Respondent seeks dismissal of this appeal under the disentitlement doctrine. Appellant was sentenced on June 28, 2018, and filed a notice of appeal on July 17, 2018. On November 1, 2018, the court issued a bench warrant when appellant failed to appear for a hearing on a "Young Adult Court Progress Report"; probation was administratively revoked, and appellant's release on own recognizance was ordered revoked. The court noted that this was the third bench warrant issued in the case.

"A reviewing court possesses the inherent power to dismiss an appeal by a party who has refused to comply with the orders of the trial court." (*People v. Puluc-Sique* (2010) 182 Cal.App.4th 894, 897, quoting *People v. Kubby* (2002) 97 Cal.App.4th 619, 622 (*Kubby*).) The theory for such dismissal is that " '[a] party to an action cannot, with right or reason, ask the aid or assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of this state. [Citations.]' " (*Kubby*, at p. 622, quoting *MacPherson v. MacPherson* (1939) 13 Cal.2d 271, 277.) This principle applies to criminal cases: " 'It has long been recognized that a convicted defendant who becomes a fugitive from justice forfeits the right to appeal that conviction.' " (*Kubby*, at p. 622, quoting *People v. Perez* (1991) 229 Cal.App.3d 302, 308.)

"Appellate disentitlement based on fugitive status is not a jurisdictional doctrine, but a discretionary tool that may be applied when the balance of the equitable concerns make it a proper sanction for a party's flight. (See *U.S. v. Van Cauwenberghe* (9th Cir. 1991) 934 F.2d 1048, 1054.) Various justifications have been advanced for its application: (1) assuring the enforceability of any decision that may be rendered on or following the appeal (*Degen v. United States* (1996) 517 U.S. 820, 824; [*People v.*] *Redinger* [(1880)] 55 Cal. [290,] 298); (2) imposing a penalty for flouting the judicial process (*Kubby, supra,* 97 Cal.App.4th at p. 623); (3) discouraging flights from justice and promoting the efficient operation of the courts (*Kubby,* at p. 626; *Ortega–Rodriguez v. United States* (1993) 507 U.S. 234, 242); and (4) avoiding prejudice to the other side caused by the defendant's escape (*People v. Kang* (2003) 107 Cal.App.4th 43, 51)." (*People v. Puluc-Sique, supra,* 182 Cal.App.4th at pp. 897–898.)

Respondent urges that in light of the evidence that appellant absconded from probation supervision, he should not be able to seek relief from this court. Appellant argues that we should not apply the disentitlement doctrine because, assuming appellant is a fugitive, it is likely due to his mental illness. The November 1, 2018, petition to revoke appellant's probation stated that appellant was in violation of probation in that he left his treatment program (HealthRight 360) on October 25, the same day he was transported to the program from county jail; that appellant's father told the probation officer on October 29, that appellant was in a hospital in Salt Lake City, Utah, where he had been taken for psychiatric emergency service after being seen cutting his face while on a train going toward Washington, D.C.; and that when the probation officer contacted the hospital, "the front desk was able to transfer the phone call to where [appellant] was located, but [the probation officer] was unable to talk to him without an access code." Appellant argues that this evidence, combined with the evidence in the record that he suffered from schizophrenia, shows it is likely his absence from court was the result of his mental illness and he should not be treated as having intentionally flouted the court's authority, as well as that because he is in a hospital, he can be returned to California.

Respondent's motion to dismiss was filed in December 2018; appellant's opposition was filed in January 2019, as was our order taking the motion under submission to be decided with the merits of the appeal. Appellant's reply brief, filed in March 2019, provides no further information about his whereabouts or mental condition, and appellant has not otherwise informed this court of developments since the November 1, 2018, probation revocation. We have no basis for concluding either that appellant is no longer a fugitive or that he remains hospitalized months after the emergency hospitalization described in the November 1 petition to revoke probation.

The record suggests that appellant's mental illness does not prevent him from understanding requirements of the judicial process, at least when he is taking his prescribed medication. Prior to sentencing, defense counsel declared that she was informed and believed that "the prospects of financial loss and criminal penalty for failure to appear under the terms of a release on own recognizance or bail are well understood by [appellant] and are a deterrent to flight." Counsel represented that appellant likely would not be competent without his medication but had "always been competent on my watch," and that he had not been "medication compliant" during the incidents that led to his convictions but had been compliant "recently" and had been "competent throughout this incarceration." The probation officer, in recommending probation, discussed appellant's need for mental health and substance abuse services and stated that through a "structured grant of probation and adequate supervision, he would receive monitoring and be able to access services at the Community Assessment and Services Center (CASC) . . . and "can continue to meet with a mental health provider and follow recommendations as made by the treatment provider." Appellant appeared as ordered for a Young Adult Court Progress Report hearing on July 17, two and a half weeks after sentencing. Whatever the circumstances described in the November 2018 revocation petition may suggest about appellant's mental status at the time he left the treatment program on October 25, and failed to appear on November 1, 2018, they are not sufficient to establish that appellant's mental illness is the cause of his continued fugitive status, or a sufficient basis for denying the motion to dismiss.

Appellant does not explain his assertion that because he was hospitalized in Utah, he can be returned to custody in California. The case he cites in support of his contention that an appeal should not be dismissed when a defendant who fled the jurisdiction of the court has been returned to custody, *Ortega-Rodriguez v. United States*, *supra* 507 U.S. at pages 245–246, found the disentitlement doctrine inapplicable where the defendant was recaptured *prior* to filing his appeal. Acknowledging that its cases "unequivocally approve dismissal as an appropriate sanction when a prisoner is a fugitive during 'the ongoing appellate process' " (*id*. at p. 242), the court reasoned that when the defendant is recaptured prior to invoking the appellate process, the rationales supporting the disentitlement doctrine are attenuated: There is no risk that the appellate court's judgment will be unenforceable; there is no threat to the efficient operation of the appellate process; and the defendant's flight signifies disrespect only of the trial court's authority, not the appellate court's; and dismissal of the appeal does not serve as a deterrence to escape. (*Id.* at pp. 246–249.) Appellant's flight months after filing his notice of appeal places him directly within the category of defendants subject to the fugitive disentitlement doctrine.

A number of cases finding it proper to dismiss an appeal due to the defendant being a fugitive from justice grant the defendant 30 days to return to custody of the authorities before the dismissal becomes effective. (*Kubby, supra,* 97 Cal.App.4th at p. 623 [citing cases].) We will follow this course. If appellant fails to demonstrate that he has returned to custody, or has been rendered unable to do so for reasons beyond his control, the appeal shall be dismissed.[4]

[4] In his opposition to the motion to dismiss, appellant asserts that we should give the parties 10 days' notice of our intention to rule on the motion "to allow for the submission of any recently acquired information about appellant's status." We have no obligation to do so. Nothing has prevented appellant from submitting updated information regarding his status to this court at any time.

DISPOSITION

The appeal shall be dismissed unless appellant, within 30 days of the filing of this opinion, surrenders himself to the custody of the appropriate San Francisco County officials. (*Kubby, supra*, 97 Cal.App.4th at p. 629.)

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Kline, P.J.

We concur:

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Richman, J.

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Miller, J.

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